U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: May 9, 1990
CASE NO. 88-INA-482

IN THE MATTER OF

DELITIZER CORP. OF NEWTON
Employer

on behalf of

JEAN DELINCE PRICIEN
Alien

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For the Employer

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For the Certifying Officer

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For the American Immigration Lawyers Association, Amicus Curiae

BEFORE: Litt, Chief Judge, Brenner, Guill, Marcellino, Marden, Murrett, Romano, Silverman and Williams, Administrative Law Judges

RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER
OF REMAND

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Delitizer Corp. of Newton, submitted the application for alien labor certification, on behalf of the Alien, Jean Delince Pricien, for the position of Jewish Specialty Head Chef (AF 1). The duties of the position, as stated by the Employer in the ETA 750A, included planning, cooking and supervising the preparation of Jewish style dishes. The application indicated that the Alien, in the job offered, would supervise two employees. The sole requirement for the job was one year experience as a Jewish Specialty Cook.

The Certifying Officer, (C.O.), issued a Notice of Findings (N.O.F), dated February 3, 1988, in which she proposed to deny certification. The C.O., citing §656.21(b)(6), stated that the Alien had no prior experience in the position of Specialty Cook prior to his tenure with the Employer. The C.O. required the Employer to provide documentation demonstrating that the job offered is "a bona fide different position in the [E]mployer's job hierarchy separate and apart from the job the [A]lien may have been hired into with less qualifications than that required by the job opportunity" (AF 7).

In response to the N.O.F. the Employer submitted a rebuttal dated February 22, 1988, consisting solely of a signed statement by its President, Robert Runstein (AF 8). Mr. Runstein stated that the job offered differed from the position of Specialty Cook "in that he [the Alien] will be supervising two other cooks and has much greater responsibility, as described in the job description" (emphasis in original).

The C.O. denied the application in a Final Determination (FD) dated May 19, 1988 (AF 10). The C.O. stated that the Employer's letter failed to demonstrate that the two jobs are different and that adequate documentation would consist of a position description, evidence of

increased level of responsibility and evidence of salary differences. The Employer then filed a request for administrative review dated June 9, 1988 (AF 11).

Having determined that the case presented an opportunity to define the legal standard under 20 C.F.R. §656.21(b)(6), the Board, on its own motion, issued a notice of en banc review dated February 9, 1990 inviting briefs from interested parties. In response to the order, the C.O. submitted a brief dated March 30, 1990. Shortly thereafter, the American Immigration Lawyers Association ("AILA") filed a brief as amicus curiae, urging reversal of the denial of certification. No brief was received on behalf of the Employer.

Issue Presented

Employer requires one year experience in the "lesser" job (that of Specialty Cook), in order to qualify for the "greater" position offered for certification (that of Head Chef). The Alien gained his experience in the "lesser" job while working for the Employer. The sole issue before this Board is whether the Employer violated §656.21(b)(6) in requiring one year experience as a Specialty Cook where the Alien gained such experience in his tenure with the Employer.

According to §656.21(b)(2), the job in question must be described without unduly restrictive requirements, i.e., requirements which are not considered customary to the occupation in the U.S. and would preclude the referral of otherwise qualified U.S. workers. Additionally, the job requirements must be the actual minimum requirements for the job, and the employer must show that it has not hired workers with less training or experience for jobs similar to that involved in the job opportunity. See §656.21(b)(6).

At the outset, we note that this Board has very little guidance in this matter, either from Congress or the courts. A review of the the legislative and regulatory history is of virtually no assistance.[1] Likewise, the federal courts have not provided any sustained direction concerning

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[1] The legislative history of the operative statute, the Immigration and Nationality Act, is silent on the legitimacy of prior experience gained with the employer. See generally Senate Report No. 748 (89th Cong., 1st Sess.).

The regulatory subsection at issue in this case, 20 C.F.R. §656.21(b)(6), was first promulgated by the Department of Labor in 1977. 42 Fed. Reg. 3440 (January 18, 1977). Initially, the subsection was numbered 20 C.F.R. §656.21(b)(14). In 1980, however, the subsection was renumbered at its current designation, without any change in substance. 45 Fed. Reg. 83926 (December 19, 1980). Notably, comments accompanied neither the promulgation nor the renumbering of the subsection.

this issue.[2] For the most part, then, discussion of the issue has been confined to decisions of this Board, panels of this Board, or pre-Board decisions by individual administrative law judges.

Pre-BALCA Decisions

Upon review of prior decisions, it is apparent that two differing interpretations of the subsection exist. The initial interpretation, in apparent disregard of the plain language of the regulation, held that any prior experience with the employer may not be used for promotion to a better job. In Frank H. Spanfelner, Jr., 79-INA-188 (May 16, 1979) (pre-BALCA), for example, the ALJ held that the alien's prior experience with the employer could not be considered legitimate experience for the job offered, regardless of the difference in positions. According to the ALJ, "the better view is that an alien cannot use the work experience gained with an employer toward promotion to a better job." Significantly, no authority was given in support of this "better view." This per se restriction was reiterated in subsequent pre-BALCA decisions.[3]

Another series of pre-BALCA decisions offers a differing interpretation of the issue. Tracking the language of the Department's Technical Assistance Guide [TAG][4], many pre-BALCA decisions held that an alien's experience with the employer in a different occupation

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[2] While the federal courts have not squarely addressed the issue, the Second Circuit's opinion in Pancho Villa Restaurant, Inc. v. U.S. Department of Labor, 796 F.2d 596 (2nd Cir. 1986), supports the basic proposition that an employer may not require experience in the job offered where the alien's experience in the job offered was gained during his tenure with the employer. But see Stewart Infra-Red Commissary of Massachusetts, Inc., v. Coomey, 661 F.2d 1, 6 n.14 (1st Cir. 1981) (Court implicitly recognizes alien's prior experience with employer in job offered as valid experience, sufficient to satisfy employer's minimum requirements).

[3] Mecta Corp., 82-INA-48 (January 13, 1982) (citing Spanfelner); Inakaya Restaurant D/B/A Robata, 81-INA-86 (December 21, 1981) ("[i]t is well settled, however, that an alien cannot use the work experience gained with an employer toward promotion to a better job"); Visual Aids Electronics Corp., 81-INA-98 (February 19, 1981); Yale University School of Medicine, 80-INA-155 (August 13, 1980); The Langelier Co., Inc., 80-INA-198 (October 29, 1980).

[4] Technical Assitance Guide No. 656 (1981) at 52-53 ("if certification is sought in a different occupation, the employer may require experience which the alien gained with the employer if the employer customarily requires such experience for the job.")

may be legitimate experience for the job offered.[5] In New England Nuclear Corp., 80-INA-272 (December 11, 1981), the ALJ stated:

> Nothing in the regulations, expressly or impliedly provides that an employer is under an obligation to applicants other than the alien to provide training similar to that experience gained by the alien while working for the employer in a position other than that for which certification is sought. (emphasis in original).

Likewise, the ALJ in Petit Fors, 82-INA-163 (August 23, 1982), held that:

> [e]xperience gained by the alien with the employer in a capacity different from the position being offered should not be a bar to the employer's ability to hire the alien absent any evidence of tailoring the job requirements to the alien's qualifications.

Significantly, cases adopting the holding of New England Nuclear and Petit Fors have required employers to document bona fide distinctions between the lesser job in which the alien gained experience and the greater job now offered. In Store Planning Associates, 82-INA-195 (June 15, 1982), for example, the ALJ concluded, based upon "a chart of the employer's job hierarchy, and comparative descriptions of the job opportunity and prior positions held by the alien," that the job offered was a "bona fide position separate from any previously held by the alien." In Dynamic Resources, Inc., 83-INA-360 (August 12, 1983), the ALJ found that the lesser position, that of programmer, was a "different" position from the job offered, financial applications specialist. In making this determination, the judge considered the length of experience neccesary, as well as the skills required, to perform each job. Moreover, the judge held that "[t]he fact that the alien achieved some of these skills for the higher level position while an employee of the employer is irrelevant in this case."

BALCA Decisions

BALCA, in its principal en banc ruling[6], has held that where "the required experience was gained by the Alien in jobs with the same Employer, the Employer must establish that the Alien

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[5] See e.g. Prefit Fabricators, Inc., 84-INA-505 (August 22, 1984); Modern Plating Co., 84-INA-479 (July 11, 1984); Romano Inc., 84-INA-343 (April 30, 1984); Mister Greenjeans, 83-INA-401 (September 27, 1983) ("[n]othing in the regulations prohibits an [a]lien from crediting experience gained with an [e]mployer in one position for a better job with the same employer"); Dynamic Resources, 83-INA-360 (August 12, 1983); Victor Sherman, 83-INA-293 (June 16, 1983).

[6] The full Board has promulgated one other decision on the issue. In Creative Plantings 87-INA-633 (November 20, 1987)(en banc), the Board found that the Employer failed to demonstrate that the Alien, in the job offered as a florist would "perform duties different from the duties she performed as assistant floral designer."

gained that experience in jobs which were not similar to the job for which certification is sought." Brent-Wood Products, Inc., 88-INA-259 (February 28, 1989) (en banc).[7]

In Brent-Wood, the Employer submitted an application for the position of Machine Setter, Woodworking (Machine Set-up II). The requirements for the job were two years experience in the job offered or two years experience in related woodworking machine set-up. The record indicated that the Alien worked for the Employer as a "Machine Set-up I" for two years.

The Board held that the Employer failed to demonstrate that the positions of Machine Set-up I and Machine Set-up II were "sufficiently dissimilar." Specifically, the Board found that the sole distinction between the two positions was the requirement that the Machine Set-up II job holder read blue prints.

The Similar Positions Standard

In Brent-Wood, and in subsequent cases, the Board adopted a standard requiring employers to prove the "dissimilarity" of the position offered for certification from the position in which the alien gained the required experience. While the standard itself is straight forward, ambiguities may exist concerning the application of the standard. We take this opportunity to clearly state how similarity or dissimilarity may be determined.

AILA, in its brief before us, proposes that the analysis of similarity between jobs be limited to a comparison of the job duties. Amicus brief at 4. AILA argues that, for purposes of §656.21(b)(6), the Department's Dictionary of Occupational Titles (DOT) should be employed in determining whether two positions are dissimilar. Indeed, AILA maintains that if the job offered has a different DOT code than the job in which the experience was gained, the two job are dissimilar. The rationale put forth rests upon the assertion that "[t]he DOT has been written by specialists of the Department of Labor . . . [and that] [j]obs which are assigned different code numbers are considered different occupations." Id. at 4. AILA also argues that, in the event two positions do not carry two different DOT codes, the jobs may still be dissimilar "[i]f the actual duties of the positions differ in significant respects." Id. at 5-6.

Upon consideration of this position, however, we find neither the rationale nor the conclusion of AILA's analysis persuasive. First, we reject AILA's argument that differing DOT codes indicate dissimilar positions for purposes of §656.21(b)(6). The DOT is a catalog of occupations; thus each separately identifiable position carries its own DOT code. This separate identity, however, has no compelling or controlling relevance to the issue of similiarity or dissimilarity of two positions. Two jobs may have separate identities (and DOT codes), but still be considered sufficiently similar under §656.21(b)(6).

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[7] Indeed, in Brent-Wood, the Board explicitly overruled a panel decision, Vacco Industries, 87-INA-711 (March 10, 1988), in which the panel implied that the Alien's prior experience, in a different job with the same Employer, was not valid experience for purposes of the job offered.

More importantly, we reject AILA's overall conclusion that the analysis of similarity between jobs be limited exclusively to a comparison of job duties. We find no basis for such a conclusion in the regulatory language. Moreover, limiting the analysis to job duties would serve only to artificially narrow the inquiry, excluding potentially highly probative information concerning the similarity or dissimilarity of the positions. Thus, while a comparison of the job duties is certainly a relevant consideration, we are not persuaded that this should be the sole consideration.

Notably, recent panel decisions have been consistent in inquiring beyond the relative job duties in determining similarity between positions.[8] For example, in Duthie Electronic Corp., 88-INA-216 (November 30, 1989), the panel found the positions of Generator Mechanic and Assistant Generator Mechanic dissimilar based upon the fact that the Employer customarily hired employees with qualifications now required of U.S. applicants. The panel also analyzed the level of responsibility, skill and supervision required in each position. Likewise, in Eimco Process Equipment Co., 88-INA-216 (August 4, 1989), the panel found the positions of Technician and Development Engineer dissimilar where the Employer demonstrated a long history of recruiting and hiring using the same minimum qualifications now required. We also note that several pre-BALCA decisions envisioned a broader definition of dissimilarity, including consideration of: the position of the jobs in the employer's job hierarchy, the requirements of the positions, as well as the duties involved.[9]

We believe that consideration of various factors, including, but not limited to, a comparison of the job duties, best effectuates the regulatory requirement of dissimilarity under §656.21(b)(6). Recognizing that a consideration of these various factors will offer Certifying Officers broad discretion in determining the similarity or dissimilarity of positions, we hold that Certifying Officers, in making such determinations must clearly state those factors included as a basis for their decisions. It must be remembered, however, that the employer bears the ultimate burden of proof to demonstrate that the positions are dissimilar.

Thus, we hold that where the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities[10], job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly

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[8] But see Kurt Salmon Associates, Inc., 87-INA-636 (October 19, 1988) (panel finds no substantial difference in duties); Conde, Inc., 87-INA-598 (December 11, 1987) (finding that positions were not similar, limiting its consideration to comparison of duties).

[9] See Store Planning Associates, 82-INA-195 (June 15, 1982); Dynamic Resources, 83-INA-360 (August 12, 1983).

[10] We are not, however, prepared to hold that adding de minimis supervisory responsibilities will, standing alone, create a dissimilar position.

created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job,[11] and the job salaries.[12]

Application of the Standard

In the instant case, the Employer has stated, in an uncontradicted affidavit, that the Chef position involves the duty of supervision, a duty which is not a part of the Cook position (AF 8). While the Employer's affidavit demonstrates sufficiently dissimilar duties, insufficient evidence exists to otherwise determine dissimilarity of the job positions. Such determination, as stated above, may also be dependent upon evidence concerning other factors. In addition, we note that the C.O., in her brief before us, stated that she is "willing to accept a remand . . . to provide the employer another opportunity to document that the two jobs are dissimilar."

Accordingly, we remand this case to the C.O. to permit the Employer, on or before 30 days from the date of this Order, to submit to the C.O. any and all additional evidence relative to these factors. The C.O., upon receipt thereof, shall then either grant or deny the application.

ORDER

The Certifying Officer's denial of certification is VACATED, and the case remanded to the Certifying Officer for further proceedings consistent with this decision.

For the Board:

RALPH A. ROMANO
Administrative Law Judge

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[11] See C.O.'s brief at 8.

[12] Id.